IN THE

SUPREME COURT OF THE UNITED STATES

No._____

JOE DELEGAL,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

_____TERM 1964

JOE DELEGAL,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

No._____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

REFERENCE TO OPINIONS

There were no opinions given by the trial judge. All proceedings had until this case reached the Fifth Circuit Court of Appeals for The United States of America are contained in the records of the court below (United States District Court) nine copies of which have been submitted with this petition. The opinion of The United States Court of Appeals For the Fifth Circuit in affirming the judgment of The United States District Court for the Southern District of Georgia is appended to this petition and is marked Appendix "A".

JURISDICTION

The grounds upon which the jurisdiction of the Supreme Court of The United States of America is invoked are set out as follows:

(a) The judgment of The United States Court of Appeals for The Fifth Circuit rendered on the 30th day of March, 1964 and entered on the same date affirming the judgment of the lower court in this case is in conflict with a decision of this Honorable Court as set out in the case of Salinger vs. U. S; 272 U. S. Reports, Page 542. The judgment of The Fifth Circuit Court of Appeals is appended as Appendix "B" to this petition.

(b) That furthermore said judgment is in conflict with other decisions of other U. S. Circuit Courts of Appeal. Those decisions being set out in the case of Holdridge vs. U. S., 282 Fed. 2nd 302 and that of U. S. vs. Barrorata et al, 45 Fed. Supp. 38.

(c) That the judgment complained of contravenes the VI amendment to the Constitution of the United States of America.

That the Fifth Circuit Court of Appeals for The United States of America denied your petitioner's petition for a rehearing on the 5th day of May, 1964. The copy of said order being appended hereto as Appendix "C".

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in this case are as follows:

1. Where the sole witness for the United States testifies that he delivered unstamped whiskey on three separate occasions to Joe Delegal and does not anywhere in his testimony identify the defendant in the court room as being the same Joe Delegal he made the deliveries to and the defendant takes the stand and denies any deliveries were ever made to him, is this evidence sufficient to convict the defendant, there being no other evidence offered as to identity? Furthermore does this not deprive the defendant of his right to be confronted by

witnesses against him as set out in amendment VI to the Constitution of the United States of America?

2. Where in a three count indictment the witness for the United States testified under count one that on a day certain he made a delivery of unstamped whiskey to the "home of Joe Delegal in Savannah, Georgia," and further testified that on two later occasions he made deliveries to "the home of Joe Delegal," these two later dates coming under counts two and three of said indictment, is the location established in count one sufficient to prove venue for counts two and three, furthermore does merely saying "home of Joe Delegal" establish venue in count two, and also in count three?

In addition does this testimony satisfy the requirements as set out in amendment VI to the Constitution of the United States of America for proving venue?

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI to the Constitution of The United States of America. (See U.S.C.A. Amend. 6-14.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE

The petitioner was indicted by a grand jury in the Savannah Division of the Southern District of Georgia, said indictment

brought in three separate counts and charging the petitioner with possession of unstamped whiskey on three separate occasions contrary to the laws of the United States of America. A history of the proceedings prior to the case reaching the Fifth Circuit Court of Appeals may be had by reference to the nine copies of the record submitted along with this petition under the rules of this Honorable Court. The sole witness for the government at the trial, C. A. Boatheimer, testified as follows: "I delivered non-tax paid whiskey to the home of Joe Delegal, here in Savannah, Georgia, on the 15th day of November, 1961. I made further deliveries to the home of Joe Delegal on the 17th and 21st of November, 1961. That each time the amount of whiskey was fifty gallons and that on all three occasions, Joe Delegal was present and accepted the whiskey and directed that the whiskey be loaded, transferred and moved into nearby houses." Petitioner in his testimony denied delivery to him and possession of the whiskey. There was no other testimony offered by either side. The defendant was found guilty by the trial judge sitting as judge and jury and was sentenced to serve three years, one year on each count to be served consecutively. Timely motion for new trial was filed and upon hearing same the motion was denied. Timely notice of appeal was filed and the case was appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the Judgment of the lower court on March 30, 1964 and timely motion for a rehearing was filed and an order was entered on the fifth day of May, 1964, denying the rehearing.

STATEMENT OF LAW AND ARGUMENT

Petitioner sets forth the following grounds for allowing his Petition for a Writ of Certiorari:

1. That upon the question of proof, or lack of proof, of identity in the instant case, we respectfully contend that no proof of identity of petitioner was adduced at the trial and that he was deprived of the rights guaranteed him by the VI Amendment to the Constitution, that is, the right of confrontation by the witnesses against him, and also he was deprived of the right to have proof submitted to show that petitioner was tried in the state and district wherein the crime was committed.

2. In regard to the total absence of proof that the defendant on trial was the man who, on three different occasions violated the law, we submit no witness confronted Delegal upon his trial with testimony as to his identity. The Fifth Circuit Court of Appeals held in their opinion affirming the judgment of the court below, "While it would have been better if the witness who testified as to the delivery of the whiskey, had pointed out the appellant as the person to whom it was delivered, the evidence was sufficient to permit the inference that the defendant on trial was the person who received the liquor." We again urge that there was no proof, either direct or circumstantial, from which it could be logically inferred that the Delegal on trial was the same Delegal to whom liquor was delivered. As was held in the case of U. S. vs. Barrorata, 45 Fed. Supp. 38, and also in the case of Salinger vs. U. S.; 272 U. S. Reports, Page 542. the defendant in a criminal case is entitled to be confronted by all the witnesses against him, and this is a common law right which was carried into the Constitution by the VI Amendment.

3. On the question of venue, it is correct that a witness testified in reference to the charge contained in the first count of the three count indictment that he, the witness, delivered non-tax paid whiskey "to the home of Joe Delegal here in

Savannah, Georgia," however there was no testimony in reference to the second and third counts as to the location of Delegal's home. Not even any street was mentioned from which a conclusion could be drawn that would prove venue. Each count of a multiple count indictment must be proved as fully as if the said counts were not merely counts but were separate indictments even though said indictments be joined together into one for convenience. As was held in the case of Holdridge vs. U. S., 282 Fed. 2nd 302, correct venue in criminal cases is a matter of Constitutional right and questions of venue are not merely matters of formal legal procedure, but raise such questions of public policy. Venue, unless properly waived is an essential part of the government's case in a criminal prosecution and must be established by adequate proof; burden of which is on the government.

Petitioner prays that the writ of certiorari issue under the Seal of this Court, and that the judgment of said United States Court of Appeals for the Fifth Circuit be reversed by the Court; and for such further relief as to this Court may seem proper.

Respectfully submitted.

_____

_____

Attorneys for Petitioner

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CERTIFICATE OF SERVICE

We hereby certify that we are attorneys of record for the petitioner in the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; and

We further certify that we have this day caused a copy of said petition to be served on Counsel for the Respondents, by depositing a true and correct copy of the same, with adequate postage affixed, and properly addressed to the following:

Solicitor General of the United States
Department of Justice
Washington 25, D. C.

The Honorable Donald Fraser
United States District Attorney
United States Post Office Building
Savannah, Georgia

MAY 28 1964

Attorneys for Petitioner

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20750

JOE DELEGAL,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(March 30, 1964.)

Before MAGRUDER.* JONES and GEWIN, Circuit Judges.

PER CURIAM: The appellant, convicted after a trial without a jury, on three counts of an indictment charging possession, in Chatham County, Southern District of Georgia, of non-tax-paid whiskey, seeks reversal of three consecutive one-year sentences. The appellant took the stand, denied receiving the liquor and denied knowing the person who testified as to

* Senior Circuit Judge of the First Circuit, sitting by designation.

the deliveries. The defense of entrapment was urged by the appellant at the trial but has been abandoned here.

Although not specifically raised at the trial, the appellant here urges that there is no proof which identified him as the Joe Delegal to whom liquor was delivered. While it would have been better if the witness who testified as to the delivery of the whiskey had pointed out the appellant as the person to whom it was delivered, the evidence was sufficient to permit the inference that the defendant on trial was the person who received the liquor.

It is asserted that venue was not proved. A witness testified that on November 15, 1961, he delivered fifty gallons of non-tax-paid whiskey to the home of Joe Delegal "here in Savannah, Georgia." He also testified that on November 17 and November 21, 1961, he made other deliveries to the home of Joe Delegal, all of which were accepted by Delegal. It could be inferred that all deliveries were made to the same place in Savannah. No proof was required that "here in Savannah" was in Chatham County, Southern District of Georgia.

There is no error. The judgment of the district court is

AFFIRMED.

APPENDIX "A"

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20750

D. C. Docket No. 16047

JOE DELEGAL,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before MAGRUDER,* JONES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* Senior Circuit Judge of the First Circuit, sitting by designation.

March 30, 1964

Issued as Mandate:

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20750

JOE DELEGAL,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(May 5, 1964)

ON PETITION FOR REHEARING

Before MAGRUDER,* JONES and GEWIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

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* Senior Circuit Judge of the First Circuit, sitting by designation.

APPENDIX "C"

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1167

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 37-38; Pet. App. 8-9) is reported at 329 F. 2d 494.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1964 (R. 38; Pet. App. 10). A petition for rehearing was denied on May 5, 1964 (R. 41-45; Pet. App. 11). The petition for a writ of certiorari was filed on June 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show petitioner's identity as the accused.

2. Whether the evidence was sufficient to prove venue.

STATEMENT

Petitioner was charged in a three-count indictment with possession, in Chatham County, Southern District of Georgia, of non-taxpaid whiskey on November 15, 17, and 21, 1961, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (R. 1-2). In a trial to the court (a jury having been waived), the district judge found petitioner guilty on all three counts and imposed consecutive sentences of imprisonment for one year on each count (R. 3, 4, 20-23). On appeal the conviction was affirmed (R. 30-31, 38; Pet. App. 10).

The evidence showed that agent Boatheimer, an Alcohol and Tobacco Tax investigator, was working undercover in the area of Savannah, Georgia (R. 5, 10-11). Boatheimer testified that on November 15, 1961 he delivered 50 gallons of non-taxpaid whiskey to the home of Joe Delegal in Savannah, Georgia. Delegal ordered three men standing there with him to unload the whiskey, which they moved into some houses nearby. Boatheimer testified that he made similar deliveries to petitioner under the same circumstances on November 17 and November 21, 1961 (R. 8, 10, 11, 12, 13).

Testifying on his own behalf, petitioner denied that on November 15, 1961 a delivery of 50 gallons of liquor was made to his home (R. 16-17). Petitioner denied knowing agent Boatheimer and stated that he had never seen him before (R. 18).

ARGUMENT

1. Contrary to petitioner's contention, the evidence was sufficient to identify him as the Joe Delegal to whom liquor was delivered.[1] There was no misapprehension on the part of the court, the attorneys, or the petitioner that agent Boatheimer in his testimony was referring to the petitioner, Joe Delegal, the man on trial. On the cross-examination of Boatheimer he testified as to conversations on the relevant dates in the indictment with "this defendant" (R. 11). Moreover, when the court asked petitioner if he had seen Boatheimer before, petitioner denied that he had ever seen him (R. 18). In so attempting to refute Boatheimer's testimony, the petitioner necessarily recognized that Boatheimer had been testifying about him. The clear inference from the totality of the evidence is that there was sufficient identification of petitioner as the Joe Delegal to whom liquor was delivered.

2. Venue in all three counts of the indictment in the "County of Chatham, within the Southern District of Georgia" was sufficiently proved. Agent Boatheimer testified that on November 15, 1961 (Count 1)

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[1] A similar contention, as to the accused's identity was rejected in *United States* v. *Griffin*, 329 F. 2d 495 (C.A. 5), pending before this Court in No. 1168, O. T. 1963.

he delivered 50 gallons of non-taxpaid whiskey to the home of the petitioner "here in Savannah, Georgia" (R. 8). The district court could take judicial notice that Savannah is in Chatham County in the Southern District of Georgia (Pet. App. 9). Boatheimer testified as to similar deliveries to petitioner under the same circumstances on November 17 and November 21, 1961 (the transactions involved in Counts 2 and 3 of the indictment) (R. 8). It was unnecessary that he specifically repeat that these deliveries were in Savannah, Georgia, since this was an unmistakably clear inference from his testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1964

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